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In the Supreme Court of the United States

OCTOBER TERM, 1957

JOSEPH S. DE VIVO, PETITIONER

v.

UNITED STATES OF AMERICA

ON MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION TO THE GRANTING OF THE PETITION FOR A WRIT OF CERTIORARI

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INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statement	2
Argument	6
Conclusion	9

CITATIONS

Cases:	
Kann v. *United States*, 323 U. S. 88	7
United States v. *Cordo*, 186 F. 2d 144, certiorari denied *sub nom. Minkoff* v. *United States*, 340 U. S. 952	8
United States v. *Johnson*, 319 U. S. 503	7
United States v. *Sherman*, 171 F. 2d 619, certiorari denied *sub nom. Grimaldi* v. *United States*, 337 U. S. 931	8
Statutes:	
18 U. S. C. 2	2
18 U. S. C. 659	2

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OPINION BELOW

The opinion of the Court of Appeals (Pet. App. 11–17) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on July 9, 1957 (2 R. 31).[1] On August 2, 1957, Mr. Justice Frankfurter extended the time for filing a

[1] The symbols "1 R." will be used to designate the pagination of the first volume of the unprinted record, which was the appendix to appellant's brief below, and "2 R." to designate the pagination of the second volume, which was the appendix to the government's brief below.

petition for a writ of certiorari to and including August 15, 1957, and on August 13, 1957, granted a further extension to and including August 22, 1957, on which date the petition was filed. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether the two courts below properly found that there was sufficient evidence to support the verdict.

STATEMENT

After a second trial by jury in the United States District Court for the Southern District of New York,[1] petitioner was found guilty under the second and third counts of an indictment charging him and co-defendants Pagano, Perrone, and Potenza with the offense of possessing goods and chattels from an interstate shipment of freight knowing them to have been stolen (in violation of 18 U. S. C. 2, 659); and with conspiracy to steal and possess merchandise taken from a truck moving in interstate commerce (1 R. 49, 51–53, 95). He was sentenced to concurrent sentences of four years on each of the counts (1 R. 95). On appeal, the judgment of conviction was affirmed (2 R. 31).

The evidence may be summarized as follows:

On October 15, 1956, Pagano came to the home of Mrs. Marguerite Schaefer in the Bronx, New York, introduced himself as John Browitz, and asked if he could rent store which was part of her 10-room boarding house, and which could be entered both from the out-

[1] A mistrial was declared in the first trial with the consent of all parties due to the absence of a material witness (1 R. 47).

side basement steps and through the basement of the premises. Pagano said he was going to use the store for storage purposes, and probably as a restaurant later. He gave her a month's rent and took her receipt (2 R. 9–13). A day or two later (October 16 or 17), Pagano brought petitioner to the Schaefer house and introduced him as "Joe", saying: "This is my friend" (1 R. 8–9, 15–16).

On October 17, 1956, a large aluminum trailer-truck of the Onondaga Freight Corporation containing a sealed consignment of 1787 cases of Vitalis hair tonic valued at about $30,000 left the Bristol-Myers plant in Syracuse, New York, destined for the company's plant in Hillside, New Jersey (2 R. 2–5; Govt. Ex. 1). The truck arrived at Pier 26, North River, New York, on the morning of October 18, 1956, where it was parked to await transshipment to Hillside, New Jersey (2 R. 6).

About 11 o'clock the same morning, a parking lot attendant saw co-defendant Pagano walking down the dock toward the trailer-truck and asked him where he was going. Pagano replied, "I am taking Onondaga 234" which was the number of the trailer (2 R. 6). The parking lot attendant saw trailer No. 234 leave the dock about 5 or 10 minutes later (2 R. 8). Mrs. Schaefer testified that a large aluminum truck backed up to the store on her premises about this time, and packages were unloaded by a group of three men (1 R. 6; 2 R. 14–15). These were identified as codefendants Pagano, Perrone, and Po[illegible].

In the latter part of October, Mrs. Schaefer went to the cellar of her boarding house and found a num-

ber of cases of Vitalis hair tonic stored there. Since she did not (2 R. 15) "like the way things were going", she told Pagano to vacate the premises, and told him that "it didn't look kosher" to her (1 R. 9–10; 2 R. 15–17). Pagano said that he would remove it.

Petitioner came to Mrs. Schaefer's premises on 5 to 10 occasions either with Pagano or looking for him (1 R. 6–7, 11). On some of these visits, petitioner brought other men to her house (1 R. 12).

One of the visits petitioner made to the Schaefer house was on November 4, 1956, about 9:00 or 9:30 o'clock (1 R. 14, 37–38). Earlier that evening, about 6:30 p. m., petitioner and Pagano were seen in a Newark, New Jersey junkyard in possession of a quantity of cosmetics, including hair tonic, shampoo, shaving cream, and toothpaste[*] which was stored in a garage-like structure on the premises (1 R. 27–30). Petitioner and Pagano told Monticello and Di Nicola in the presence of the government witness Mucchiello that they (1 R. 30–33), "should take the stuff [the cosmetics] over to New York". Then either petitioner or Pagano, in the presence of the other, wrote out a note containing an address in the Bronx, and also a telephone number "Tulip 2-9777" (1 R. 34–35) (the number of Mrs. Schaefer's pay telephone (2 R. 20)), and gave it to Mucchiello (1 R. 35–36). Di Nicola rented a truck into which the goods were loaded and

[*] While these cosmetics were not the property described in the indictment, evidence as to this transaction was admitted by the court under instructions to the jury that it was being admitted only to show petitioner's knowledge and acquaintanceship with Mrs. Schaefer's premises in the Bronx (1 R. 43–44).

drove to the Bronx address indicated on the note, Mucchiello following in his own automobile (1 R. 36). When they arrived at the indicated address, Mucchiello called the number given them, and petitioner and Pagano arrived in five minutes (1 R. 36–37). Pagano got into Di Nicola's truck, and petitioner with his own automobile led the three-vehicle convoy to the Schaefer house, arriving about 9:00 o'clock p. m. (1 R. 37–39). Mucchiello and Di Nicola helped unload the cosmetics at the back of the house into the cellar, and then went to a restaurant (1 R. 40–41). Pagano then went to Mrs. Schaefer and asked (2 R. 18) "if he could use a room upstairs to case some goods for a couple of hours". She indicated a room he could use. Thereafter, she heard the voices of a number of unidentified men, and one of them said (2 R. 19) "There is a suspicious looking Nash", "It looks like the law".

Pagano joined Mucchiello and Di Nicola at the restaurant about 10:00 or 10:30 p. m., told them to return to New Jersey, and that he would pay them later. Mucchiello told Pagano that he was concerned about the suspicious looking Nash automobile which he had observed following them. Pagano assured him that there was nothing to worry about since they were "just agents" (1 R. 41–42).

On November 5, 1956, the next day, Mrs. Schaefer told Pagano to get "that stuff" out of her house, and he said he would remove it with a truck. During the afternoon of November 6, Perrone called three times and said that he was coming with a truck later in the day (2 R. 20–23). F. B. I. agents Durkin and Burns,

who had arrived at about 1:00 p. m., were waiting on the premises (2 R. 22). Petitioner and Pagano came to the Schaefer house about 6:30 p. m., rang the bell, and were admitted by F. B. I. agent Durkin. The two men went to Mrs. Schaefer's room. After conversing with her, they left the house (1 R. 17–19).

The F. B. I. agents approached petitioner and Pagano outside of the house, identified themselves as federal officers, and asked what business they had at the house. The two men said that they had come there to rent a room. Petitioner told the officers that he had been to the Schaefer home on only two previous occasions to rent a room, the first time about a year before and the second time two weeks earlier (1 R. 19–23). Petitioner explained that he and Pagano just happened to be in the neighborhood, had stopped by to visit his brother, and not finding him home had "dropped over" to Mrs. Schaefer's house to rent a room (1 R. 23–24). The cases of stolen Vitalis hair tonic were found in the basement of the Schaefer house, and the truck-trailer was found abandoned nearby (Pet. App. 12).

ARGUMENT

1. Petitioner's position is, in essence, that the evidence was insufficient to prove his complicity in either the substantive offense of possessing the stolen goods or the conspiracy charged. His petition seeks a third review by this Court of the sufficiency of the evidence—a function this Court has consistently refused to undertake where both courts below have passed on the issue, and have found the evidence legally sufficient.

Kann v. *United States*, 323 U. S. 88, 93; *United States* v. *Johnson*, 319 U. S. 503, 518.

The evidence strongly implicates petitioner in both crimes. There was evidence not only of petitioner's close association with the others, but of his assertion of dominion and control both over the premises where the goods were stored and the stolen goods. On November 4, 1956, when petitioner and Pagano hired others to carry a load of cosmetics to the Schaefer house, either he or Pagano, in the presence of the other, gave the drivers an address to which they should go, and Mrs. Schaefer's telephone number to call on arrival. Then, petitioner, who had obviously been at the Schaefer house with Pagano awaiting the call, led the three-vehicle convoy to the Schaefer house and was present when the material was unloaded into the basement. This testimony, which was limited by the court to prove that petitioner had a participating interest in the premises where the stolen property was stored, plainly evidences that fact. As to the stolen goods themselves, after Mrs. Schaefer had demanded that they be removed, petitioner appeared at the Schaefer house shortly before Perrone was due to arrive with the truck to transport the goods, obviously for the purpose of assisting in the removal, and not for the purpose of renting a room as he falsely stated to the agents. The further false statements made by petitioner to the agents that he had visited the Schaefer house only twice before, and only once within the preceding year, and that on this particular night he had casually dropped by with Pagano to rent a room, further evidences his guilty knowledge of the illegal activity therein being conducted.

2. Since the sentences were concurrent, petitioner's contention going only to the conspiracy count is not really in the case. On the assumption that there was no evidence that he knew the merchandise was stolen from an interstate shipment, he argues that the court below erroneously affirmed the conviction on the theory that such proof was not required (Pet. 7–8). The short answer to this contention is that the trial judge submitted the case to the jury under instructions that, while proof of knowledge of the interstate character of the shipment from which the goods were stolen was not a requisite of proof under count two charging possession, a different rule applied to the proof of conspiracy under count three (1 R. 63), "where the government is required to prove, not only that he knew of the illicit character of the merchandise, but also knew that it was moving in interstate commerce." Compare: *United States* v. *Cordo*, 186 F. 2d 144, 147 (C. A. 2), certiorari denied *sub nom. Minkoff* v. *United States*, 340 U. S. 952; *United States* v. *Sherman*, 171 F. 2d 619, 623 (C. A. 2), certiorari denied *sub nom. Grimaldi* v. *United States*, 337 U. S. 931. The jury must be assumed to have followed that instruction and, on the basis of the evidence outlined above, reached the reasonable conclusion that petitioner, as a partner in the conspiracy, possessed the requisite knowledge that the goods had been taken from an interstate shipment in addition to the other elements of the offense.*

*This issue was not specifically raised in petitioner's brief in the Court of Appeals. The only basis for the assumption that it was passed on by that court (which did not discuss the issue in its opinion) is that the issue was adverted to in the government's brief below in a footnote (Pet. 6).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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SEPTEMBER 1957.